Supreme Court of the United States

OCTOBER TERM, 1959

No. 164

MORRY LEVINE,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated June 24, 1959

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Petitioner, Morry Levine, respectfully prays that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York, convicting petitioner of criminal contempt for petitioner's refusal to answer questions put to him by the Court in the presence of the grand jury. The sentence imposed was 12 months. Petitioner was enlarged on bail of $5,000. pending appeal. The Court of Appeals has granted a stay of its mandate pending final disposition by this Court.

Opinion Below

The *per curiam* opinion of the Court of Appeals has not been officially reported and is printed *infra* at page 29.

The District Court's decision on the questions of law is not officially printed but appears *infra* at page 8.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 2, 1959.

Jurisdiction to review such judgment by the Writ prayed for is conferred on this Court by §1254, Title 28, U. S. C. and is invoked pursuant thereto and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented For Review

1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution.

3. Whether the denial by the District Court of compulsory process violated petitioner's rights under the Sixth Amendment to the United States Constitution.

4. Whether, notwithstanding the decision of this Court in *United States* v. *Brown*, 359 U. S. 41, the procedure followed herein resulting in petitioner's conviction of criminal contempt under Rule 42(a), Federal Rules of Criminal Procedure, deprived petitioner of Due Process, constituted the proceedings abhorrent to the concepts of the fundamental fairness requisite in Federal criminal proceedings and emasculated the scope and force of Rule 42(b) of the Federal Rules of Criminal Procedure.

5. Whether, notwithstanding the decision of this Court in *United States* v. *Brown, supra*, because of its direct conflict with the decision of this Court in *Clark* v. *United States*, 289 U. S. 1, the revival of purgation by oath, as exemplified by the proceedings in *United States* v. *Brown, supra*, and in this case, ought to be reconsidered and rejected and the Government remitted in this case and similar cases to proceedings under Rule 42(b) of the Federal Rules of Criminal Procedure.

6. Whether the sentence of 12 months imposed upon petitioner constituted cruel and unusual punishment or an abuse of the District Court's discretion.

Constitutional Provisions, Statutes and Regulations Involved

The pertinent Constitutional Provisions, Statutes and Regulations being lengthy are set forth as an appendix to this petition *infra*, p. 32, *et seq.* and their citations follow: United States Constitution, Amendments V, VI and VIII; Federal Rules of Criminal Procedure, Rules 42(a) and 42(b).

Statement of the Case

Petitioner is a principal in interest of Young Tempo, Inc., a New York dress manufacturer and of Acme Dress Company, located in Midvale, New Jersey (20a, 24a).*

T. & R. Trucking Company has transported dresses for Young Tempo, Inc. and Acme Dress Company between New York City and Midvale, New Jersey (23a, 24a).

John Dioguardi is, according to the government's information, the actual owner of T. & R. Trucking Company, although Theodore Rij is the nominal proprietor. In the

* References thus are to the Appendix to Petitioner's Brief in the Court of Appeals, copies of which are being filed herewith.

Southern District grand juries are conducting a general racketeering investigation, as well as an investigation of the Victor Riesel obstruction of justice case. The subjects of these investigations are Dioguardi and Rij (also known as Ray) and possibly others (42a).

Petitioner appeared on numerous times before two of these other grand juries pursuant to subpoena (32a). Petitioner's first appearance related to the Riesel obstruction of justice case and the location of Rij. Petitioner's subsequent appearances were before a grand jury investigating alleged racketeering in the garment trucking industry. At the time of the proceedings below, petitioner was still subject to the subpoena under which he appeared before the other grand juries, his further appearance pursuant thereto having been adjourned.

Before the other grand juries, petitioner was told by the prosecutor that he was to be indicted (10a, 32a) for a violation of the Internal Revenue laws. Other business associates of petitioner, also witnesses before the same grand jury were told by the same prosecutor that they were going to be indicted for violation of the Internal Revenue laws.

On or about March 25th petitioner's counsel, at the prosecutor's request, attended at his office (15a, 21a) and was told that the government was about to institute an investigation under the Interstate Commerce Act, that petitioner would be subpoenaed to appear before the grand jury conducting this investigation and that the immunity statute contained in the Interstate Commerce Act (Section 46, Title 49, U. S. C. A.) would apply and that the Fifth Amendment plea could not be interposed.

Thereafter petitioner was served with a subpoena requiring his personal appearance before the April, 1957 grand jury "to testify all and everything which you may

know in regard to an alleged violation of Sections 309, 322, Title 49 United States Code" (19a, 20a).

Petitioner's counsel was present in the anteroom and petitioner was advised that he could on reasonable request consult with his attorney (18a).

Petitioner, after the preliminaries were disposed of was asked (20a): "Mr. Levine, are you associated with Young Tempo, Inc."?

Petitioner requested and received permission to consult with his attorney (20a). After such consultation, petitioner returned to the grand jury room, the question was read to him again and he answered "I must refuse to answer that question on the grounds that it may tend to incriminate me" (20a).

The prosecutor then advised petitioner "that this Grand Jury is conducting an investigation into possible violation of the Interstate Commerce Laws * * * more specifically, the sections of the United States Code that were specified on the subpoena served upon you * * *" and "that in Title 49, United States Code, Section 305(d), the Congress * * * has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Part * * * shall, by virtue of his testimony, be given full and complete immunity * * *" and that he did "not have any privilege to plead the Fifth Amendment before this Grand Jury in this inquiry" (20a, 21a).

The grand jury foreman then directed petitioner to answer the questions previously asked by the prosecutor. Petitioner again refused to answer on the ground of possible self-incrimination (22a).

Petitioner again consulted with his counsel and once more refused to answer the question on the ground of possible self-incrimination (22a, 23a). Thereafter five more questions were put to petitioner by the prosecutor,

all of which petitioner refused to answer on the ground of possible self-incrimination (23a, 25a).

The questions which petitioner refused to answer, because of possible self-incrimination, are:

> "1. Mr. Levine, are you associated with Young Tempo, Inc.? (20a). 2. Mr. Levine, does Young Tempo, Inc. use a trucking company known as the T. & R. Cutting Company or the T. & R. Trucking Co.? (23a). 3. Mr. Levine, who do you know to be the owner or owners or the principal in interest or principals in interest of the T. & R. Cutting or the T. & R. Trucking Company? (23a). 4. Mr. Levine, are you associated with Acme Dress Co. in Midvale, New Jersey? (24a). 5. Mr. Levine, does the T. & R. Trucking Co. provide trucking services between Young Tempo, Inc. in New York City and the Acme Dress Co. in Midvale, New Jersey? (24a). 6. Mr. Levine, do you know if the T. & R. Trucking Co. or the T. & R. Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York and Midvale, New Jersey?" (24a, 25a).

After the refusal of petitioner to answer the above questions, the grand jury, prosecutor and petitioner and his counsel proceeded to District Judge Levet's courtroom (7a).

The prosecutor outlined the procedure requested by the government to be followed and on behalf of the grand jury requested the aid and assistance of the court in a direction to petitioner to answer the questions (7a, 8a). The courtroom was cleared.

The prosecutor stated that the government requested that the court follow the identical procedure followed in the case of *Emanuel Brown* v. *United States*, then on appeal and subsequently decided by this Court, 359 U. S. 41.

In essence that procedure was, as outlined by the prosecutor and followed by the court, a determination pre-

liminarily by the court as to whether the witness had to answer the questions and, if so, a direction that he answer the questions, the return of the witness to the grand jury room and upon his further refusal to answer the questions before the grand jury, the return of the grand jury to the court with the second request that the same questions be put by the court to the witness and, if the witness then refused to answer, the government would ask that he be held summarily in contempt in accordance with Rule 42(a), Federal Rules of Criminal Procedure.

Petitioner's counsel requested (8a, 9a) an adjournment, notice under Rule 42(b) of the Federal Rules of Criminal Procedure, a specification of charges and an opportunity to prepare for trial.

Petitioner's counsel also requested the Court (9a) to grant petitioner compulsory process to require the production and attendance of witnesses so that the issues of fact on the hearing could be met. Compulsory process was requested by petitioner's counsel for the United States Attorney in the Southern District, the minutes of the grand jury in this investigation, the Interstate Commerce Commission and Justice Department, as well for the production of the charge by the court to this grand jury and the *voir dire* of this grand jury at the time of its empanelling (9a, 10a).

The court denied the motion for adjournment, for compliance with Rule 42(b) of the Federal Rules of Grand Jury and for compulsory process (11a-17a).

The grand jury stenographers were then called by the government (17a, 18a, 19a, *et seq.*). They read their transcribed minutes of the proceedings in the grand jury room (17a, *et seq.*). Thereupon petitioner's counsel renewed his prior motions and applications, which were again denied (26a, 27a).

Argument was then had on the applicability of the Immunity Sections of the Motor Carriers Act [Title 49, U. S. C. A. §305(d)] (29a, *et seq.*)

The court rendered its decision as follows (35a):

> "Now under the circumstances and upon all the facts and upon all the record, and for the reason which I set forth at the time of the disposition of a similar matter, in the matter of the witness Emanuel Brown, I am forced to conclude that the immunity is there, that the witness must answer, and I therefore direct him to answer the questions which were set forth by the witnesses from the Grand Jury who testify today."

The grand jury was then recessed by the court until Monday, April 22, 1957 at 10:30 A.M. with a direction to the petitioner to attend (36a).

Pursuant to the court's direction petitioner returned to the grand jury room at the time appointed and there the prosecutor put to him the six questions directed to be answered (45a, *et seq.*), which petitioner refused to answer on the claim of his privilege against self-incrimination.

The grand jury, petitioner and counsel then proceeded to the courtroom of District Judge Levet (36a).

The courtroom was cleared at the direction of the court (36a, 37a) and the proceedings were thenceforth held in secret.

At that time the prosecutor stated to the court that "the April 1957 regular Grand Jury once again requested the assistance of the court in regard to the witness Morry Levine (petitioner)" (37a).

Application was then made by petitioner's counsel that the court follow the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure and due process and that petitioner be furnished with notice of the charges and an opportunity to prepare and to frame the defenses

to the charges (37a-43a). The court overruled the application (40a-43a).

Petitioner's counsel also requested an adjournment so that he might subpoena witnesses and apply for compulsory process and renewed all the motions and applications which he had made at the prior session (40a-43a).

These motions and applications were overruled by the court (40a-43a).

The grand jury stenographer read her untranscribed minutes (44a, *et seq.*) which disclosed that petitioner had once more refused in the grand jury room to answer the six questions set forth above on the ground of possible self-incrimination.

The prosecutor then requested that the court put to petitioner the questions refused by him to be answered and to direct him to answer the same (46a).

Over petitioner's objection the court directed him to take the stand in the courtroom (46a, 47a).

The court did not swear petitioner but stated that he was "still under oath • • • with respect to what is said here, and with respect to any testimony • • •" (47a).

On inquiry by his counsel as to whether the proceeding was "the grand jury proceeding", or "a contempt proceeding" the court stated that it was "the Court and the Grand Jury" (47a) and that it was a "proceeding in accordance with Rule 42(a)" (47a).

Petitioner's counsel objected to the procedure, requested that the court proceed in accordance with Rule 42(b) and objected to petitioner "being put on the stand in a proceeding in which he is in jeopardy and which involves the possibility of a criminal contempt and being required to testify in a proceeding in which he is in jeopardy in violation of his constitutional rights" (47a).

The court overruled the applications and objections (48a).

The court then put to petitioner the same six questions (*supra*, p. 6) over the specific objection of petitioner's counsel to each question and to each direction (48a-51a), and as to each such question he refused to answer on the ground of possible self-incrimination (48a-51a).

The court then at the request of the prosecutor inquired of petitioner whether, if he returned to the grand jury room, he would still decline to answer (50a). The court overruled petitioner's counsel's objection to this question and petitioner answered that he "must decline to answer these questions * * * on the ground that they may tend to incriminate him before the grand jury" (51a).

The prosecutor then requested the court to "adjudicate" petitioner "in contempt of this court for a violation of the lawful order and direction of the court * * * for a contempt committed in the physical presence of the Judge" (15a).

After listening to petitioner's counsel's reasons (51a, 52a) why petitioner should not be adjudicated in contempt, the court stated that he was forced by reason of petitioner's conduct and failure to answer to adjudicate him in contempt (52a).

Counsel for the government was then heard by the court on the question of sentence and in that regard he said, among other things, the following (52a, 53a):

> "Now the Government for these reasons feels that a substantial sentence, and I would use the term again, is called for and it is not for its punitive effect but for a coercive effect upon this witness.
>
> "The Government again will ask that in pronouncing sentence this Court should not include what is commonly referred to as a purge clause."

After hearing petitioner's counsel on the question of the quantum of sentence, the court sentenced petitioner

to be confined for a period of one years and admitted him to bail pending appeal (54a).

ARGUMENT

The reasons relied on by petitioner for the allowance of the writ are these:

1. The decision below is in conflict with the decisions of other Courts of Appeals on the same matter;

2. The Court below has rendered a decision in conflict with applicable decisions of this Court;

3. The Court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Trial Court as to call for an exercise of this Court's power of supervision;

4. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

I.

This case presents to this Court for review an aspect of the proceedings in the Second Circuit for the handling of recalcitrant grand jury witnesses which was not decided in *United States* v. *Brown*, 359 U. S. 41.

In the *Brown* case, *supra*, as indicated in footnote 11, this Court did not consider petitioner's claim that "the District Court proceeding was conducted in 'secrecy', because the record does not show this to be the fact".

In this case, however, the record is unmistakably clear that the proceedings throughout were secret (36a, 37a).

Consequently in contravention of this Court's decision in *Re Oliver*, 333 U. S. 257, not only the proceedings leading up to the summary conviction for criminal contempt, but also the actual adjudication and sentence were held *in camera*.

The factual situation in this case is particularly apposite to that of the *Oliver* case, *supra*.

In the *Oliver* case a Michigan Circuit Judge sat as a one man grand jury thereby constituting in one person a "Judge-Grand Jury" and this bi-morphic entity put the questions to the witness and upon his allegedly contumacious conduct before it held the witness guilty of criminal contempt and sentenced him to jail.

In this case similarly the federal grand jury of 23 persons and the judge were converted into a "Judge-Grand Jury" and as a bi-morphic entity, put the questions to petitioner and on his refusal to answer held petitioner in contempt and sentenced him to jail.

Indeed the District Court was asked (47a) when the petitioner was called to the stand in the courtroom "What is this proceeding now? Is this the Grand Jury proceeding, or is this a contempt proceeding?" The Court replied "The Court and the Grand Jury".

The secrecy of such proceedings was condemned by this Court in the *Oliver* case, *supra*. Mr. Justice Black in that case at page 264 clearly pointed out the reasons why the requirements of grand jury secrecy cannot apply to contempt proceedings for the witness's alleged misbehavior before the grand jury.

Mr. Justice Black said:

> "* * * It has long been recognized in this country however that the traditional 12 to 23-member grand juries may examine witnesses in secret sessions. * * * Many reasons have been advanced to support grand jury secrecy. * * * But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict. They render no judg-

ment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. *Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. • • • the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.*

"Here we are concerned, *not with petitioner's rights as a witness in a secret grand jury session*, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both." [Emphasis supplied]

While it is true that petitioner's counsel was present throughout the proceedings in the courtroom, it is nevertheless also true that a "secret proceeding is no less secret because the defendant is allowed to have counsel" (Warren, Ch. J., *Brown* v. *United States*, *supra*, fn. 15).

The evils inherent in a secret proceeding are not lessened or eradicated by the fact that counsel for the accused is also present. The opportunity for intimidation or persecution and the consequent possible abuse of judicial power remain. The advocate militant in such *in camera* proceedings may indeed merely be another candi-

date for a contempt adjudication. Compare *Sacher* v. *United States*, 343 U. S. 1, especially dissenting opinions at pp. 14, *et seq.*

The necessity of restraint upon the judiciary based upon other than their self control has been recognized by this Court and the most potent force in this regard is publicity, because as Mr. Justice Black said in the *Oliver* case at page 270 the "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

Indeed, even if it may be said that requiring publicity for proceedings such as these involving a grand jury investigation may impair the investigative powers of the inquest, the choice must be made in favor of Due Process and fair play as against secret inquisition. This Court made a comparable choice in *Jencks* v. *United States*, 353 U. S. 657, as did the Second Circuit Court of Appeals in *United States* v. *Andolschek*, 142 F. 2d 503.

II.

The imposition of secrecy in this proceeding violated the Sixth Amendment to the United States Constitution which guarantees a public trial in all criminal prosecutions.

This Court has held that in proceedings which result in a judgment of criminal contempt, the defendant is entitled to the rights accorded to the defendant in criminal cases. *Cammer* v. *U. S.*, 350 U. S. 399, 403; *Re Michael*, 326 U. S. 224; *Nye* v. *U. S.*, 313 U S. 33; *Michaelson* v. *U. S.*, 266 U. S. 42, 66; *Gompers* v *Buck's Stove & Range Co.*, 221 U. S. 418, 444.

The defendant in a criminal contempt case should be held to be entitled also to the guarantee of a public trial.

The rationale of the requirement of a public trial is grounded on firm principles—adherence to which has always been thought to be vital to a free democratic society.

As pointed out[4] by Mr. Justice Black in the *Oliver* case, *supra*, at page 268:

> "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

While it has been held that in the absence of objection the accused in a criminal case subjected to a trial *in camera* will be deemed to have waived the guarantee of a public trial, there are cases which in their holdings are more consonant and consistent with the preservation of this basic right and which should be followed here.

Thus, in *State* v. *Hensley*, 75 Ohio St. 255, the Court held against the waiver by silence of the guarantee of a public trial saying:

> "It is, however, insisted by counsel for the state that, because no specific objection or exception was

entered by the defendant at the time the order was made or was being enforced, the error, if any was committed, cannot now be taken advantage of. This objection ignores the force and effect of the constitutional provision. The right to a public trial is guaranteed. It is of the same high order of right as the other guaranties embodied in the section,—that to appear and defend in person and with counsel, that to meet the witnesses face to face and have compulsory process, and that to a trial by jury. The right cannot be waived by silence any more than can the right to be tried by jury where the accusation is a felony and the plea is not guilty. This right should not be confused with a claim, sometimes made, that a reversal should be ordered where a jury has been obtained in a way not strictly conforming to the statute. The manner of selecting the jury is matter of procedure only; and this court has often held that objection to the mode must be made at the time, but that an impartial jury must be obtained, and, if that result is reached, the accused is not harmed."

See also *State* v. *Delzoppo*, 86 Ohio App. 381; *E. W. Scripps Company* v. *Fulton*, 100 Ohio App. 157; *People* v. *Jelke*, 308 N. Y. 56.

Hence, in view of the denial of Due Process and the violation of the guarantee in the Sixth Amendment to a public trial which occurred in this case serious questions are presented for consideration by this Court and certiorari should be granted to review the same.

III.

In this case petitioner's counsel requested that the court grant the witness compulsory process to require the production of evidence and the attendance of witnesses (9a).

The government argued that, since petitioner's counsel

had been in the *Brown* case, *supra*, he should have had his subpoenas out prior to then (15a) but, as pointed out to the court, there was no case, no proceeding involving this petitioner before he was actually brought before the grand jury. It was not and is not possible in the absence of a case to go to the clerk of the District Court and request subpoenas in a case which is not pending. It would have no caption. There would be no jurisdiction to issue them. It was only, as petitioner's counsel pointed out, when petitioner was for the first time brought before the court that there was some proceeding pending in which compulsory process might have been requested.

It was also argued to the court that the evidence sought to be obtained by the compulsory process would be inadmissible, but assuming *arguendo* that to be so, the simple answer is that the court can rule on the evidence, when it is offered, but it cannot prevent a defendant's counsel from obtaining and using the compulsory process of the court to obtain evidence. It is elementary that inadmissibility is determined when evidence is offered (15a, 16a).

The court, however, refused (16a) to issue compulsory process then, as well as when the petitioner was once more brought before the court (40a-43a).

Not only was the issuance of compulsory process essential on the issues of fact inherent in the case, but also on the question of possible extenuation of the contempt. By the denial of compulsory process petitioner was denied the opportunity to "demonstrate extenuating circumstances", *Brown* v. *United States*, *supra*, dissenting opinion. And as Mr. Chief Justice Warren pointed out in the *Brown* case, *supra*, the assertion that only a legal issue was involved here "overlooks the right of petitioner to present evidence in extenuation."

Consequently petitioner has been deprived of a basic constitutional right guaranteed to him by the Sixth Amendment to the Constitution and the intervention of this Court is required to redeem this constitutional right.

IV.

While in *Brown* v. *United States, supra,* this Court decided the procedural questions presented here adversely to that petitioner, this petitioner urges that that decision is one which ought to be reconsidered and redecided, as otherwise, were it to remain unassailed, it would be not only a blow but a continuing threat to Due Process and that fundamental fairness so devoutly espoused in the judicial administration of our criminal law.

It is believed that it is unnecessary at this point to restate the arguments made to this Court in the *Brown* case, *supra,* or to remind the Court of the cogent and persuasive reasoning set forth in the dissenting opinion in the *Brown* case. Suffice it to say that on all the points urged in the *Brown* case and in that dissenting opinion the holdings in *Brown* on the procedural questions should be once more considered by this Court and that this petitioner should be permitted by means of a writ of certiorari to reargue these points to the Court.

It is necessary, however, to point out certain matters which were obviously not apparent until after the determination of the *Brown* case.

The *Brown* case, *supra,* in substance and in effect, revived the doctrine of "purgation by oath" finally and effectively rejected by this Court in *Clark* v. *United States,* 289 U. S. 1, 19. There Mr. Justice Cardozo said that "little was left of that defense after the decision of this Court in *United States* v. *Shipp,* 203 U. S. 563, 574" that the doctrine "has even lost * * * the title to respect that comes of a long historical succession" and that "the time

has come, we think, to renounce the doctrine altogether and stamp out its dying embers".

In spite of this unequivocal and decisive renunciation of "this intrusion or perversion of the canon law" [Holmes, J., *United States* v. *Shipp*, 203 U. S. 563, 574], this Court in the *Brown* case, *supra*, breathed a smouldering life into its embers, long ago thought to have been extinguished in the Federal courts. See *41 Harv. L. Rev. 61; People* v. *Gholson*, 412 Ill. 294.

Simple analysis of this Court's opinion in *Brown* demonstrates that it created a life after death for "purgation by oath."

In this Court's opinion in *Brown* it is stated that that petitioner "was for the first time guilty of contempt" when he again refused to answer the grand jury's questions "upon his return to the grand jury room after the District Court had ruled on the question of immunity." Thus, then and there was a complete crime prosecutable by notice and hearing under Rule 42(b). (See this petitioner's Appendix, 39a, 40a).

But, this Court went on to hold that the District Court could then put a recalcitrant witness on the stand and afford him the opportunity to purge this completed crime of contempt by answering the grand jury's question before the Judge—clearly, purgation by oath and that, if he refused, as this petitioner did, to purge himself, he was guilty of contempt summarily punishable under Rule 42(a).

In *United States* v. *Brewster*, 154 F. Supp. 126 [*reversed on other grounds*, 255 F. 2d 899 (C. A., D. C.)] the defendant on an indictment for contempt of the United States Senate argued that, even if he had been in contempt in refusing to answer certain questions before a subcommittee, he had nevertheless "purged" himself by subsequently furnishing the required information to the

Select Committee. The District Court, holding that the contempt was criminal, stated that "the defense of purging in criminal contempt has been abolished" and that "this defense is no longer valid."

If *Clark* v. *United States, supra,* is still the law, then the decision in this case and *Brown* v. *United States, supra,* is in direct conflict therewith. If the *Clark* case had been followed in *Brown,* this Court could not have concluded that, if that witness had answered the grand jury's questions before the Judge, he would have purged himself of his contempt before the grand jury.

Particularly apposite here, because its conflict in principle with this case is so clear, is this Court's decision in *United States* v. *Norris,* 300 U. S. 564. There, in a trial for perjury the defense was urged that before the same tribunal the witness had retracted and corrected his falsehoods and thus his crime was purged. This Court gave the perjurer no *locus poenitentiae*—it held the perjury complete when uttered and hence indictable and not subject to purgation.

So here, too, as in *Brown,* there is and was no real place of penitence for petitioner for his overt refusal to answer in the grand jury room—unless the *Norris* and *Clark* cases, *supra,* are to be deemed overruled by *Brown, supra.*

Nor is the impact of the *Clark* and *Norris* cases, *supra,* overcome or even blunted by the theory adopted by the Court in *Brown, supra,* of a "continuing contempt"—more accurately to be described as an "open-end" crime.

The Court in holding in *Brown, supra,* that a witness's refusal to answer before the Judge was an act "continuing his contempt" necessarily overlooked (1) that it had held he could have been prosecuted under Rule 42(b) for criminal contempt for his refusal to answer in the grand jury room after the Court's direction to answer

and (2) that under the *Clark* and *Norris* cases, *supra*, a recalcitrant witness can still be so prosecuted.

It cannot be said that the crime of criminal contempt was not complete when done in the grand jury room (see 39a, 40a). If that were so, this Court could not say, as it did in *Brown, supra*, that that petitioner could be prosecuted for the refusal in the grand jury room. The crime could not be both complete and incomplete.

In *Brown*, as here, there necessarily had to be two contempts—the one before the grand jury and the one before the court (if that be a contempt). The contempt before the grand jury was an entirely separate crime from the contempt before the court, of which he was convicted. But petitioner by reason of the affirmance in the *Brown* case, *supra*, on the theory of continuing contempt also stands convicted of a crime other than either one of the two which he may have committed.

The certificates of the Trial Judge in both cases make this indisputable. As in *Brown*, the certificate here in no way shows that petitioner was convicted below for continuing before the Court his overt refusals before the grand jury (4a-6a).

This certificate too makes no reference whatsoever to the proceedings before the grand jury, after the Court's direction to petitioner to answer the questions. It also recites merely that petitioner was brought before the Judge and that in the presence of the grand jury, the Judge put the questions to him, that he refused to answer after having been directed to do so, that he failed to state any valid reason why he should not be held in contempt, and that accordingly petitioner was summarily found to be in contempt of court under Rule 42(a).

In *Brown*, this Court, in order to avoid the problem of multiplication of contempts clearly inherent in that and this case, described the crime as a continuing con-

tempt. But for this so-called continuing contempt neither witness was convicted. If either had been convicted of this continuing contempt, then the certificate would have had to recite the proceedings before the grand jury. This each very carefully does not do. The Assistant United States Attorney who prepared each certificate and the District Court Judge who signed both were undoubtedly well aware of the fact that to include the grand jury proceedings in the certificate would necessarily invalidate it, because then, as pointed out by this Court in *Brown*, there would have had to be proceedings under Rule 42(b) and the error would appear plainly on the face of the certificate.

Accordingly, if this Court meant in *Brown* to supply the defect in the Rule 42(a) procedure here by adding to the certificate the matter contained in the Record as to the proceedings before the grand jury, then the certificate as so amended *ad hoc* would be invalid and the conviction should fall. There would seem to have been no disagreement in this Court about this basic rule that, if the proceedings resulting in a contempt took place before a grand jury in its room, then Rule 42(b) must be applied.

And this is a basic distinction between *Brown* and this case and *Yates*, 355 U. S. 66. There the continuing contempt occurred before the same tribunal. Here, while the grand jury concededly is an appendage of the court, proceedings before it are not the same as proceedings before the court, and for the court to take cognizance of contumacious conduct before the grand jury, proceedings under Rule 42(b) must be instituted. By the device of labeling the petitioner's refusal to answer before the District Judge as a continuation of the contempt before the grand jury, this basic difference cannot be obscured.

Even if this Court, by describing *Brown's* refusals as a continuing contempt, intended to imply that such pro-

ceedings, as in this case, before the court are a continuation of the grand jury proceedings, the error is not cured thereby, because what transpires before the grand jury takes place outside of the presence of the court, and in this phase of the contempt the witness is certainly entitled to notice and hearing. Thus, the "rollup" or merger of the refusal before the grand jury into the alleged contempt before the court which is implied in *Brown* in this Court's phrase "finally adjudicating" (Op., p. 11) is impossible.

In sum, this Court held in *Brown* that the conviction of a witness in the posture of petitioner can stand, because he refused to purge himself, when as matter of law long settled by this Court, he could not have purged himself of his contempt in the grand jury room. By answering before the Court he could at the most only avoid a coercive sentence or mitigate his punishment for his contempt before the grand jury. *Wilson* v. *United States*, 65 F. 2d 621 (C. C. A.) 3; *United States* v. *Collins*, 146 Fed. 553, 554.

Consequently for all of the above and upon the arguments and dissenting opinion in *Brown*, the Court should grant certiorari to review this conviction.

V.

In holding in *Brown* that a witness's refusal before the District Judge to answer the grand jury's questions "left the Court no choice" but to convict him of criminal contempt under Rule 42(a), this Court overlooked, it is respectfully submitted, the power of the District Court to commit recalcitrant witnesses, such as this petitioner until he make answer to these questions.

While for the contempt committed in the grand jury room petitioner could only be prosecuted and punished

under Rule 42(b), the District Court, for the purpose of obtaining his answers to the questions and aiding and assisting the grand jury to that end, could commit him until he should make answer thereto. Petitioner does not deny the District Court's coercive power to commit him until he make answer. Petitioner does contend that he could not and should not be convicted summarily of criminal contempt under Rule 42(a) for not having answered the grand jury's questions before the District Court.

This Court in *Brown*, to justify its upholding of this abuse of the summary contempt power, cited a number of decisions of this Court and the Courts of Appeals as "at least *sub silentio*" approving "such a procedure" which its opinion described as "stemming • • • from usages of the common law."

Of the cited cases decided in this Court, not one, openly or silently, furnishes such approval of such summary procedures culminating in punitive sentences for contempt.

In *Hale* v. *Henkel*, 201 U. S. 43, 46, the coercive order of the Circuit Judge committed Hale "to the custody of the Marshal until he should answer the questions and produce the papers." Similarly, in *Wilson* v. *United States*, 221 U. S. 361, 369, 371, the commitment was to the custody of the Marshal until the witness shall perform the required acts. In *Curcio* v. *United States*, 354 U. S. 118, this Court did not approve the procedure there followed and necessarily did not consider that issue, because its sustaining of the Fifth Amendment plea disposed finally of the case. Besides there the six months sentence contained a blanket purge provision.

Much was attempted to be made of *Rogers* v. *United States*, 340 U. S. 367, in the Court's opinion in *Brown*. All that was presented on the procedural questions in that case was whether that petitioner had a right to counsel in a Rule 42(a) proceeding and whether that right to

counsel had been infringed by the summary proceedings there followed. The fundamental questions presented in *Brown* or in this case were not at all submitted to the Court in the *Rogers* case. To show that only the right to counsel was involved in the *Rogers* case, it is necessary only to quote from the next to last sentence of that petition for rehearing, at page 11. This sentence is, "We hope and trust that this court will listen to our plea against this apparent denial by the trial court of so basic a right as the right to be heard by counsel before pronouncement of judgment."

Lopiparo v. *United States*, 216 F. 2d 87, is one of the Courts of Appeals cases cited by this Court in *Brown* as representing approval of the summary contempt procedure followed there and here. There, however, sentence was not to the penitentiary, but to the custody of the Marshal for 18 months or until the further order of the Court should the contemnor produce before the grand jury the required records before the expiration of the sentence or the discharge of the grand jury—in effect, a coercive sentence. In *United States* v. *Weinberg*, 65 F. 2d 394, while the sentence was for a determinate period, the contemnor unlike this petitioner was prosecuted on presentment by the grand jury.

As to the earlier practice at common law, the cited case of *People ex rel. Phelps* v. *Faucher*, 4 Thompson & Cook 467, involved a commitment until the witness should answer. *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74, is also to be distinguished because it is quite clear that the Court of Appeals held on the record there that the relator had waived all procedural issues "in order to have a prompt determination of the constitutional question involved." In *Re Belle Harris*, 4 Utah 5, the Court there exercised the power of coercion by committing the witness until she should answer the questions. Besides,

this case arose under the Utah Territory statute and not at common law.

In overlooking this clear and unmistakable power of the court to commit the petitioner until he make answer to the grand jury's questions, this Court in *Brown* was led into the error of sanctioning a procedure wholly violative of due process and totally inconsistent with its statement of the purpose of summary proceedings before the Court.

In its opinion in *Brown*, this Court says that a "judge more intent upon punishing the witness than aiding the grand jury in its investigation might well have taken" the course of instituting prosecution of petitioner for criminal contempt under Rule 42(b), but instead the District Court "made another effort to induce the petitioner to testify."

While it would seem that this statement by the Court is intended to be a rephrasing in the terms of the *Brown* case of certain language in *Yates* v. *United States*, 355 U. S. 66, 75, the proceedings in the *Brown* and this case do not at all accord with the phraseology of *Yates*. There, Mr. Justice Clark said, "The more salutary procedure would appear to be that the court should first apply coercive remedies in an effort to persuade a party to obey its orders and only make use of the more drastic criminal sanctions when the disobedience continues." In *Brown* and here, however, there was no imposition of coercive remedies, only a substitution of the more drastic criminal sanctions for the coercive remedies.

If the District Court had applied the coercive remedies and no answers resulted within a reasonable time, it still remained open to commence a prosecution of the petitioner under Rule 42(b) for his overt refusal in the grand jury room. But the District Court did not apply any coercive remedies, and thus in reality proceedings incon-

sistent with this Court's expression in the *Yates* case, *supra*, have been here sanctioned.

VI.

The sentence of one year constituted cruel and unusual punishment and an abuse of the court's discretion. While the question of sentence was primarily for the District Court, there is still a right of review of the quantum of the sentence as recognized by this Court in *United States* v. *Brown*, 359 U. S. 41.

Here petitioner refused to answer questions concededly incriminatory on grounds which had substantial legal basis (*viz.*, *United States* v. *Brown*, 359 U. S. 41) and was then necessarily in a quandary because of the uncertainty at least as to the legal situation confronting him as to his rights under the Fifth Amendment and the purported immunity statute; yet the District Court imposed a cruel and unusual punishment of one year imprisonment.

In Section 322, Motor Carriers Act, Title 49 U. S. C., the section under which investigation was being had by the grand jury, there is no offense for which a jail sentence may be imposed except in a case under subdivision (d) which applies only to certain employees of the Commission. All other violations are punishable only by fine.

Section 309, Title 49 U. S. C., the other section involved in this grand jury investigation, contains no punitive provision.

Thus even if petitioner or any other person incriminated by him were prosecuted for violations of these sections of the Interstate Commerce Act, there could be no jail sentence but the District Court nonetheless imposed the sentence of one year for refusal to answer questions claimed to concern possible violations of this statute.

Attention is called to *Moore* v. *United States*, 150 F. 2d 323 (C. A. 10). There it was held that the penalty attached to the substantive criminal offenses and its seriousness is an element to be considered in determining the reasonableness and oppressiveness of the punishment imposed in the contempt proceedings.

Nor can the alleged contempt here be analogized to a violation of the provisions of the Criminal Code concerning obstruction of justice, Title 18, U. S. C. §§1501, *et seq.* If, as stated in *United States* v. *Brown*, *supra*, it may be so analogized, then under §402, Title 18 U. S. C. the sentence could not exceed six months.

The abuse of discretion inherent in this twelve months sentence is readily apparent from the study and analysis of sentences given in comparable cases contained in Footnotes 11 and 12 of Mr. Chief Justice Warren's dissenting opinion in *United States* v. *Brown*, *supra*.

WHEREFORE, it is respectfully prayed that a writ of certiorari issue to the Court of Appeals for the Second Circuit to review petitioner's conviction here.

Respectfully submitted,

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Dated June 24, 1959

APPENDIX

Per Curiam Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—October Term, 1958.

(Argued May 4, 1959 Decided June 2, 1959.)

Docket No. 24669

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORRY LEVINE,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*,
WATERMAN, *Circuit Judge*, and
GALSTON, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, Judge.

Morry Levine appeals from a conviction of criminal contempt for refusing to answer certain questions put

to him by the court in the presence of the grand jury. Affirmed.

MYRON L. SHAPIRO, New York City, for defendant-appellant.

MARK F. HUGHES, JR., Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Album C. Martin and Arthur B. Kramer, Asst. U. S. Attys., New York City, on the brief), for appellee.

PER CURIAM:

Having refused to answer questions before a federal grand jury despite the direction of the district court that he do so, appellant was again brought before the district judge, who in the presence of the grand jury addressed the same questions to him, explicitly directed him to answer them, and, upon his refusal to do so, adjudged him guilty of criminal contempt and sentenced him to one year's imprisonment. The propriety of Levine's sentence and of the procedures below leading to his conviction has been recently approved in *Brown* v. *United States*, 359 U. S. 41, affirming *United States* v. *Brown*, 2 Cir., 247 F. 2d 332, as was the efficacy of the immunity from prosecution granted him under §205(e) of the Motor Carrier Act, 49 U. S. C. §305(d). Hence the errors assigned as to them must be overruled. Similarly, there is no merit in appellant's contention that he was improperly denied compulsory process to prove before the district judge that the grand jury was not

in fact investigating violations of the Motor Carrier Act. We know of no decision allowing a witness before a grand jury to probe into the purposes of its investigation or suggesting that the immunity from prosecution granted him would not be valid unless he did so. Levine appeared before the district court as a witness, not a party, *Brown* v. *United States, supra,* 359 U. S. 41; as such his claim of a right to compulsory process is as much without basis as his contention that the Court's very act of propounding the questions to him violated his privilege against self-incrimination. 359 U. S. 41, 50 n. 10. He raises no other points of merit on this appeal.

Affirmed.

Relevant Statutes

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 42. Criminal Contempt

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the fact and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Relevant Statutes

United States Constitution, Amendments V, VI and VIII.

V

"No person • • • shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury • • • and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;"

VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."